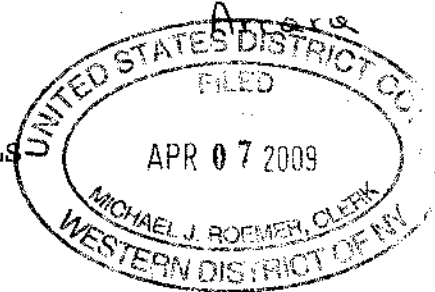


**MANDATE**

07-5718-cr

United States v. Bossinger

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**SUMMARY ORDER**

4 RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED  
 5 AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND  
 6 FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT  
 7 CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION  
 8 MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)."  
 9 UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE  
 10 WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV](http://www.ca2.uscourts.gov)), THE  
 11 PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER  
 12 WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE  
 13 AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT  
 14 DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

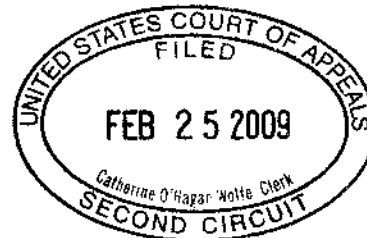
15 At a stated term of the United States Court of Appeals for the  
 16 Second Circuit, held at the Daniel Patrick Moynihan United States  
 17 Courthouse, 500 Pearl Street, in the City of New York, on the  
 18 25<sup>th</sup> day of February, two thousand nine.

19 PRESENT:

20 HON. ROBERT D. SACK,  
 21 HON. BARRINGTON D. PARKER,

22 Circuit Judges,

23 HON. TIMOTHY C. STANCEU,\*

24 Judge.25 -----  
26 UNITED STATES OF AMERICA,27 Appellee,

28 - v. -

No. 07-5718-cr

29 KELLY A. BOSSINGER,

30 Defendant-Appellant.

31 -----

\* The Honorable Timothy C. Stanceu, of the United States  
 Court of International Trade, sitting by designation.

ISSUED AS MANDATE:

March 24, 2009

1 Appearing for Appellant: David M. Samel, Law Office of David  
2 M. Samel, New York, NY

3 Appearing for Appellee: Stephan J. Baczynski, Assistant  
4 United States Attorney, for  
5 Terrance P. Flynn, United States  
6 Attorney for the Western District  
7 of New York, Buffalo, NY

8 Appeal from a judgment of the United States District Court  
9 for the Western District of New York (Richard J. Arcara, Chief  
10 Judge).

11 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND  
12 DECREED that the judgment of the district court be, and it hereby  
13 is, AFFIRMED.

14 The defendant, a former United States Customs and Border  
15 Protection Officer, appeals from a judgment of conviction by the  
16 United States District Court for the Western District of New  
17 York. A jury found the defendant guilty of intentionally  
18 accessing a federal government computer in excess of her  
19 authorization, in violation of 18 U.S.C. § 1030(a)(2)(B); making  
20 false statements to federal investigators about the matter, in  
21 violation of 18 U.S.C. § 1001; and conspiracy to make false  
22 statements, in violation of 18 U.S.C. § 371. We assume the  
23 parties and counsel are familiar with the facts and procedural  
24 history of the case, and the issues presented on appeal.

25 The defendant makes three challenges to her conviction. We  
26 think each is without merit, but the third warrants a word of  
27 caution.

28 First, the defendant argues that the evidence was  
29 insufficient to convict her on any of the three counts. We  
30 review the question de novo. See United States v. Naiman, 211  
31 F.3d 40, 46 (2d Cir. 2000). "On a sufficiency challenge, 'we  
32 view the evidence in the light most favorable to the government,  
33 drawing all inferences in the government's favor and deferring to  
34 the jury's assessments of the witnesses' credibility.'" United  
35 States v. Parkes, 497 F.3d 220, 225 (2d Cir. 2007), cert. denied,  
36 128 S. Ct. 1320 (2008) (quoting United States v. Arena, 180 F.3d  
37 380, 391 (2d Cir. 1999)). We must sustain the verdict when "any  
38 rational trier of fact could have found the essential elements of  
39 the crime beyond a reasonable doubt." Id. (quoting Jackson v.  
40 Virginia, 443 U.S. 307, 319 (1979)) (emphasis in Jackson).

1 We conclude that the evidence was sufficient to convict the  
 2 defendant on the computer crime count. The government was  
 3 required to prove that she "intentionally access[ed] a computer  
 4 without authorization or exceed[ed] authorized access, and  
 5 thereby obtain[ed] . . . (B) information from any department or  
 6 agency of the United States." 18 U.S.C. § 1030(a)(2). The  
 7 defendant concedes that she accessed TECS in excess of her  
 8 authorization to do so but argues that testimony that she "ran" a  
 9 valid license plate number to test the system's automatic e-mail  
 10 notification process does not establish that she "actually  
 11 obtained information" from running the test. But a rational jury  
 12 could have found beyond a reasonable doubt, if it credited  
 13 Crooks's testimony, that the defendant's "test" provided her with  
 14 information from a government agency. This is all the government  
 15 was required to prove in that regard. See 18 U.S.C. §  
 16 1030(a)(2).

17 The defendant argues that this reasoning improperly  
 18 collapses the crime's "access" element with its supposedly  
 19 separate mandate that the crime result in the defendant obtaining  
 20 information. But "obtaining information" is not an element of  
 21 the crime; "obtaining . . . information from any department or  
 22 agency of the United States" is. 18 U.S.C. § 1030(a)(2)(B).  
 23 There is no dispute in this case that the information Bossinger  
 24 accessed was information from an agency of the United States.

25 The defendant's challenges to her convictions on the two  
 26 other counts also fail. The evidence was sufficient to allow a  
 27 rational jury to find, beyond a reasonable doubt, that Bossinger  
 28 falsely denied accessing TECS to test the e-mail notification  
 29 system and that Crooks and Bossinger conspired to lie to  
 30 investigators. The defendant's challenges to her co-  
 31 conspirator's credibility are without merit, because we must  
 32 defer to the jury's assessment in that regard. See Parkes, 497  
 33 F.3d at 225. The defendant's argument that "whether [she]  
 34 admitted or denied" the true reason for her accessing the system  
 35 "was of no consequence to the investigators" is an unsuccessful  
 36 attempt to challenge the materiality of her statement. Securing  
 37 a confession is of paramount consequence to investigators, not  
 38 least because it would have saved the time and expense of this  
 39 prosecution and appeal. Moreover, to be material a statement  
 40 need only have "a natural tendency to influence . . . the  
 41 decision of the decision-making body to which it is addressed,"  
 42 United States v. Gaudin, 515 U.S. 506, 509 (1995) (quotation  
 43 marks omitted), it need not actually exert such influence.

44 Second, the defendant challenges the admissibility of  
 45 certain evidence. "We review a trial court's evidentiary rulings

1 deferentially, and we will reverse only for abuse of discretion.  
 2 To find such abuse, we must conclude that the challenged  
 3 evidentiary rulings were arbitrary and irrational." United  
 4 States v. Quinones, 511 F.3d 289, 307-08 (2d Cir. 2007) (citation  
 5 and internal quotation marks omitted). We have no cause to reach  
 6 that conclusion here. An investigator's testimony that he  
 7 disbelieved the defendant's explanation for accessing the TECS  
 8 system was admissible to prove materiality. And evidence of the  
 9 defendant's participation in an uncharged conspiracy to access  
 10 the same system was relevant to undercut the defense theory that  
 11 she played no culpable role in the charged conspiracy.

12 Third, the defendant argues that the prosecutor committed  
 13 misconduct in summation. We think this point has some merit, for  
 14 the prosecutor did a breathtaking variety of things we have  
 15 repeatedly cautioned the government to avoid.

16 For example, the prosecutor improperly characterized aspects  
 17 of the defense case using derogatory terms, including "sl[e]ight  
 18 of hand," "spin[ning] a story," "complete okey-doke," a "bit of  
 19 drivel," "simply outlandish nonsense," "a bill of goods," "hiding  
 20 the ball," and "just throw[ing] stuff up in the air and hop[ing]  
 21 something sticks." See, e.g., United States v. Resto, 824 F.2d  
 22 210, 212 (2d Cir. 1987) (stating that references to defense  
 23 tactics as "slick bits," "slyness" or "sleight-of-hand" were  
 24 improper and warranted reprimand); United States v. Biasucci, 786  
 25 F.2d 504, 514 (2d Cir. 1986) (stating that characterization of  
 26 defense questions as "nonsense" was "improper and ha[s] no place  
 27 in any court"), cert. denied, 479 U.S. 827 (1986); cf. United  
 28 States v. Salameh, 152 F.3d 88, 138-39 (2d Cir. 1998) (finding no  
 29 prejudice in prosecutor's use of "bill of goods" to refer to  
 30 defense argument when made in rebuttal), cert. denied, 525 U.S.  
 31 1112 (1999).

32 The prosecutor also improperly referred to the defendant's  
 33 statements as "lies" more than 30 times in the course of a 24  
 34 page summation transcript, see United States v. Peterson, 808  
 35 F.2d 969, 977 (2d Cir. 1987) (finding improper the excessive or  
 36 inflammatory use of "lie" to characterize disputed testimony);  
 37 cf. Floyd v. Meachum, 907 F.2d 347, 354-55 (2d Cir. 1990)  
 38 (stating that use of "the terms 'liar' or 'lie' over 40 times in  
 39 characterizing [a defendant], who did not testify" was "clearly  
 40 excessive and inflammatory"), used sarcasm as a rhetorical device  
 41 to attack the credibility of the defendant, cf. United States v.  
 42 Burns, 104 F.3d 529, 537 (2d Cir. 1997), and misstated two pieces  
 43 of evidence. The government concedes only the last point was  
 44 error.

1 Defense counsel failed to object to anything but the  
2 derogatory comments. That makes the argument for reversal  
3 difficult, because, while we review the comments about the  
4 defense case to evaluate the severity of the misconduct, the  
5 measures adopted to cure it, and the certainty of conviction  
6 without it, we review the remainder of the misconduct only for  
7 "flagrant abuse" causing substantial prejudice. Salameh, 152  
8 F.3d at 134.

9 We think the repeated derogatory comments, while  
10 inappropriate, did not suffice to deprive the defendant of a fair  
11 trial. And we think the remainder of the conduct did not rise to  
12 the level of flagrant abuse. Nevertheless, we cannot comprehend  
13 why the government would put a strong case in jeopardy by  
14 resorting to such tactics. It should not have done so. See  
15 generally United States v. Modica, 663 F.2d 1173 (2d Cir. 1981)  
16 (per curiam), cert. denied, 456 U.S. 989 (1982).

17 For the foregoing reasons, the judgment of the district  
18 court is hereby AFFIRMED.

19 FOR THE COURT:

20 Catherine O'Hagan Wolfe, Clerk of the Court

21 By: Franklin Perry  
22  
23

A TRUE COPY

Catherine O'Hagan Wolfe, Clerk

by: Torche Sulu

Deputy Clerk